Filed 4/5/04 Westminster 49 Investors v. Waier CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

WESTMINSTER 49 INVESTORS, LLC, et al.,

Plaintiffs and Appellants,

v.

RANDALL S. WAIER et al.,

Defendants and Respondents.

G031277

(Super. Ct. No. 02CC06867)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, David C. Velasquez, Judge. Reversed and remanded.

Wendel, Rosen, Black & Dean, Charles A. Hansen, Thiele R. Dunaway and Joan M. Cambray for Plaintiffs and Appellants.

Law Offices of Randall S. Waier and Randall S. Waier for Defendants and Respondents.

* * *

Plaintiffs Westminster 49 Investors, LLC, Buena Park 53 Investors, LLC, and Fontana 76 Investors, LLC appeal from a judgment entered after the court sustained a demurrer to their complaint without leave to amend. Plaintiffs contend the court erred when it ruled the recordings of lis pendens by defendants Randall S. Waier and Kirk S. Evans were privileged and thus defeated plaintiffs' causes of action for slander of title and abuse of process. Recordation of a lis pendens cannot form the basis for a claim for abuse of process, and the demurrer to those causes of action was therefore properly sustained without leave to amend. But because there was no action pending, the lis pendens were not privileged, and thus the claims for slander of title are proper. Therefore, we reverse as to those causes of action.

FACTS

Plaintiffs allege in their complaint that they own, respectively, three parcels of real property in the cities designated in their names. In 2000, Centerstone Development filed an action against defendant Evans (first action) regarding certain real estate projects in which they were involved. The parties settled the first action, documenting the terms in a written settlement agreement. As part of that settlement, Evans relinquished any interest he had in plaintiffs' properties. Pursuant to the terms of the settlement agreement, the parties dismissed the first action with prejudice.

In April 2002, Evans filed a motion to enforce the settlement agreement, which the trial court denied for lack of jurisdiction. He then filed a petition for writ of mandate which we denied on the ground that once the case was dismissed with prejudice, the court had no jurisdiction to hear the motion. (*Evans v. Superior Court* (Dec. 23, 2002, G030788) [nonpub opn.].)

At the same time Evans filed his motion to enforce the settlement, he also "caused to be recorded" through his attorney, defendant Waier, a lis pendens against each of plaintiffs' three properties, using the caption and filing number of the first action.

Based on those recordings, plaintiffs filed suit against defendants for slander of title, cancellation of cloud on title, and abuse of process. They alleged the lis pendens were void because they did not relate to a real property claim, the action had been dismissed 18 months earlier, plaintiffs were not obligors under the settlement agreement, and defendants had recorded the lis pendens to coerce payments under the settlement agreement.

Plaintiffs also filed a motion to expunge the lis pendens. The next day, defendants filed notices of withdrawal of all three lis pendens. They also filed an opposition to the motion to expunge, stating in part that they withdrew them before they knew of the motion.

Defendants filed a demurrer to the complaint, asserting that the causes of action for cancellation of the cloud on title were moot because the lis pendens had been withdrawn, and the recordings are privileged under Civil Code section 47 and do not constitute process. The court sustained the demurrer without leave to amend, finding that "the causes of action are either moot or privileged under Civil Code section 47." In so doing it found that the first action, which had been dismissed with prejudice, was "an action previously filed" as required by Civil Code section 47, subdivision (b)(4).

DISCUSSION

Lis Pendens Not Privileged Under Civil Code Section 47

Plaintiffs contend the court erred when it ruled the lis pendens were privileged under Civil Code section 47. We agree.

Civil Code section 47, subdivision (b)(4) provides: "A recorded lis pendens is not a privileged publication unless it identifies an action previously filed with a court of competent jurisdiction which affects the title or right of possession of real property, as authorized or required by law." Thus, there is a privilege to record a lis pendens only if these conditions are met.

A lis pendens provides constructive notice that an action concerning real property is *pending*. (*Blackburn v. Bucksport etc. R. R. Co.* (1908) 7 Cal.App. 649, 653.) Pending means "[r]emaining undecided; awaiting decision <a pending case>." (Black's Law Dict. (7th ed. 1999) p. 1154, col. 2; see *Harris v. Grimes* (2002) 104 Cal.App.4th 180, 189.)

Here, there was no pending action. The complaint alleges the first action, the case to which the lis pendens referred, had been dismissed with prejudice 18 months earlier. For purposes of the lis pendens, that meant there was no pending action.

Defendants' argument that the motion to enforce the settlement agreement constituted an action does not suffice. Filing the motion did not bring the action back to life. Defendants also selectively quote a portion of Code of Civil Procedure section 1049, arguing that an action is pending from "its commencement until its final determination upon appeal . . . ." But contrary to their claim, the proceeding before us was not an appeal but an independent writ petition. The time for appealing the dismissed action had long since passed. (Cal. Rules of Court, rules 2, 3.) And, under Code of Civil Procedure section 1049, the action was no longer pending because "the time for appeal ha[d] passed . . . ."

Defendants also rely on the trial court's finding that under Civil Code section 47, the action does not have to be pending, only "previously filed." This reading of the section violates basic rules of statutory construction which require that we determine the Legislature's intent to effect the purpose of the statute. (*Chaffee v. San Francisco Library Commission* (2004) 115 Cal.App.4th 461, 468.) In doing so, we must avoid an absurd result. (*Ibid.*) It makes absolutely no sense to expand the meaning of "an action previously filed" to include one which has been dismissed. The purpose of Civil Code section 47, subdivision (b)(4) was to limit the absolute privilege lis pendens had previously enjoyed. (*Woodcourt II Limited. v. McDonald Co.* (1981) 119 Cal.App.3d 245, 249.) In fact, the intent underlying the statutory scheme governing lis pendens is to

restrict the broad scope of the constructive notice provided in common law. (*BGJ Associates v. Superior Court* (1999) 75 Cal.App.4th 952, 966.) "[L]is pendens is a provisional remedy which should be applied narrowly." (*Id.* at p. 967.)

Thus, recording of the lis pendens did not fall within the limits of a privileged publication under Civil Code section 47, subdivision (b)(4), and plaintiffs may bring a claim for slander of title. The demurrer to those causes of action must be overruled.

The Slander of Title Causes of Action Lie Against Defendant Waier

Defendants contend Waier, "acting only in his capacity as [defendant] Evans'[s] attorney," is not a proper party because an attorney is liable only where there is actual fraud or he owes a duty to a third party. We are not persuaded.

In addition to the two instances defendants set out, an attorney is liable for his intentional torts. (E.g., *Pavicich v. Santucci* (2000) 85 Cal.App.4th 382, 395 [fraud]; *Westamco Investment Co. v. Lee* (1999) 69 Cal.App.4th, 481, 487 [malicious prosecution]; *Miller v. Rau* (1963) 216 Cal.App.2d 68, 77 [conversion]; see *Ross v. Creel Printing & Publishing Co.* (2002) 100 Cal.App.4th 736 [intentional infliction of emotional distress].) Here, the complaint sets out the elements of the intentional tort of slander of title as to Waier. This is sufficient to defeat a demurrer.

Demurrer Correctly Sustained as to Causes of Action for Abuse of Process

Plaintiffs contend that, although not expressly stated, the trial court erroneously sustained the demurrer to the causes of action for abuse of process because it found a lis pendens was not a process. Our review of the record shows the court sustained the demurrer on the ground of privilege under Civil Code section 47. For the same reasons as discussed above, privilege does not apply. But, contrary to plaintiffs' claim, a lis pendens is not a process, and the abuse of process causes of action fail.

In *Woodcourt II Limited v. McDonald Co., supra,* 119 Cal.App.3d at p. 251, the court held recording a lis pendens did not "constitute process in the sense that 'abuse of process' is used." This was based on "'the essence of'" abuse of process, i.e., "'the misuse of the power of the court; it is an act done in the name of the court and under its authority . . . .' [Citation.]" (*Id.* at p. 252.) Filing a lis pendens, *Woodcourt* held, does not involve a party taking action pursuant to the court's authority. (*Ibid.*)

Plaintiffs attempt to distinguish *Woodcourt* by arguing the California Supreme Court "has not read the word 'process' so narrowly . . . ." But their arguments are not persuasive. First, only one of the two cases they cite in support of this position was decided by the Supreme Court, and both cases predate *Woodcourt*. Moreover, neither deals with a lis pendens.

Further, this issue was revisited in a very recent case which arrived at the same result. In *Palmer v. Zaklama* (2003) 109 Cal.App.4th 1367, 1379, the court quoted with approval the holding in *Woodcourt* that a lis pendens is not a process, and then held: "The recordation of a notice of lis pendens, even if done for an improper purpose, is not a valid basis for a cause of action for abuse of process, entirely apart from whether the recordation was privileged. [Citation.]" (*Palmer v. Zaklama, supra,* 109 Cal.App.4th at p. 1381.) Plaintiffs have not given us reason to depart from this holding.

DISPOSITION

The judgment is reversed, and the case remanded to the superior court to overrule the demurrer to the causes of action for slander of title. Appellants are awarded costs on appeal.

RYLAARSDAM, ACTING P. J.

WE CONCUR: O'LEARY, J.

MOORE, J.